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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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PERSHING PACIFIC WEST, LLC, a
Delaware limited liability company

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Plaintiff,

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v.

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MARINEMAX, INC., a Delaware
corporation; MTU DETROIT DIESEL,
INC. D/b/a DETROIT DIESEL
CORPORATION, a Delaware
corporation; MTU Friedrichshafen
GmbH, a Foreign corporation;
FERRETTI GROUP, USA, INC., a
Florida corporation and DOES 1 through
30,

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Defendants.

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Civil No. 10-cv-1345-L (DHB)

**ORDER REGARDING JOINT
MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE**

[ECF No. 95]

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On January 17, 2013, the Plaintiff and Defendants MTU Detroit Diesel Corporation and MTU Friedrichshafen GmbH, filed a joint Motion for Determination of Discovery Dispute Regarding Responses to Requests for Production of Documents. (ECF No. 95.) After reviewing the Joint Motion and supporting exhibits, the Court GRANTS in part and DENIES in part Plaintiff's request to compel Defendants to respond to Plaintiff's document requests.

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I. BACKGROUND

2 This action arises from Plaintiff Pershing Pacific West, LLC's¹ purchase of a 72-
3 foot motor yacht manufactured by Pershing S.p.A, an Italian corporation wholly owned
4 by the Ferretti Group, for \$5,000,000. Plaintiff alleges the yacht was in defective
5 condition at the time of the sale and seeks rescission and/or to recover damages based
6 upon the purchase. Plaintiff has brought claims against MarineMax as the seller, Ferretti
7 Group USA ("Ferretti") as manufacturer of the yacht, and MTU Detroit Diesel
8 ("MTUDD") and MTU Friedrichshafen GmbH ("MTUFN") (collectively, "MTU") as
9 manufacturer and warrantor of the yacht's engines. On February 7, 2013, Plaintiff filed
10 a Second Amended Complaint, asserting the following claims: (1) Revocation of
11 Acceptance against MarineMax; (2) Rescission against MarineMax; (3) Breach of
12 Implied Warranty of Merchantability against MTU; (4) Breach of Implied Warranty of
13 Merchantability against Ferretti; (5) Negligence against MTU and Ferretti; and (6)
14 Breach of Express Warranty against MTU. (ECF No. 98.)

15 Plaintiff alleges the engines and fuel delivery system for the yacht are defective.
16 Plaintiff further alleges that MTU was aware of the problems by virtue of similar
17 problems reported on similar vessels with MTU's same engines and fuel delivery
18 systems. Plaintiff states the MTU Defendants neglected and failed to properly and timely
19 repair Plaintiff's yacht and failed to advise Plaintiff of the systemic nature of the
20 problems. MTU counters that Plaintiff's allegations are meritless and/or grossly
21 exaggerated. MTU contends Plaintiff's warranty issues were addressed properly and
22 timely.

23 Plaintiff propounded Requests for Production of Documents to all Defendants,
24 including MTUDD and MTUFN. Among the Requests, Plaintiff seeks documents
25 relating to other vessels with similar engines and fuel delivery systems as used in
26 Plaintiff's yacht. MTUDD objected on relevance grounds. MTUFN also objected on

²⁸ ¹ Pershing Pacific West, LLC is a limited liability company formed for the purpose of purchasing the yacht, and is wholly owned by Eric B. Benson. (ECF No. 98 at ¶ 1.)

1 grounds that the Court does not have jurisdiction over it, that German law does not permit
 2 the discovery sought, and that any discovery must comply with the Hague Convention.
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4 II. DISCUSSION

5 The threshold requirement for discoverability under the Federal Rules of Civil
 6 Procedure is whether the information sought is “relevant to any party’s claim or defense.”
 7 Fed. R. Civ. P. 26(b)(1). In addition, “[f]or good cause, the court may order discovery
 8 of any matter relevant to the subject matter involved in the action. Relevant information
 9 need not be admissible at the trial if the discovery appears reasonably calculated to lead
 10 to the discovery of admissible evidence.” *Id.* The relevance standard is thus commonly
 11 recognized as one that is necessarily broad in scope in order “to encompass any matter
 12 that bears on, or that reasonably could lead to other matter that could bear on, any issue
 13 that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
 14 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). However broadly defined,
 15 relevancy is not without “ultimate and necessary boundaries.” *Hickman*, 329 U.S. at 507.
 16 Accordingly, district courts have broad discretion to determine relevancy for discovery
 17 purposes. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002).

18 District courts also have broad discretion to limit discovery. For example, a court
 19 may limit the scope of any discovery method if it determines that “the discovery sought
 20 is unreasonably cumulative or duplicative, or can be obtained from some other source that
 21 is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C)(I).

22 A. MTUDD’s Responses to Plaintiff’s Requests for Production

23 1. Requests Relating to Other Similar Boats and Engines

24 Plaintiff propounded several Requests for Production seeking documents relating
 25 to other vessels and engines that are similar to the subject vessel. Plaintiff claims
 26 documents relating to other vessels are relevant because at least four or five other
 27 Pershing 72 yachts have had similar issues with the fuel delivery system, and Plaintiff has
 28 recently received documents from other defendants that indicate the MTU Defendants

1 were aware of the problems and failed to respond properly. MTUDD served objections-
2 only responses to these requests. MTUDD contends that it did not manufacture, sell, or
3 warrant the engines. MTUDD also argues that mechanical problems and warranty claims
4 related to other engines are not relevant to the warranty claims at issue in this litigation.
5 MTUDD further argues that even if the Court finds some of the information Plaintiff
6 seeks is relevant, the Court should limit the scope of production.

7 The Court notes that although MTUDD apparently did not manufacture or sell the
8 engines, it did process warranty claims. The Court finds that information regarding other
9 vessels that experienced similar engine and/or fuel delivery system malfunctions is
10 relevant for discovery purposes. Defendant argues the information is not relevant to the
11 warranty claims. However, Plaintiff has also brought a negligence claim against both
12 MTU Defendants. If another customer experienced engine or fuel delivery system issues
13 with a similar 12V2000M93 engine, that would be relevant to whether Defendants knew
14 of a systemic defect in the engines. In addition, information regarding the warranty work
15 completed on similar vessels with similar issues may be relevant to whether Defendants
16 exercised reasonable care in correcting the issues with the subject vessel. Moreover,
17 although Defendants dispute whether Plaintiff actually experienced mechanical problems,
18 at this juncture in the litigation, Plaintiff is entitled to receive discovery based on the
19 claims alleged in the Second Amended Complaint. Therefore, the Court finds the
20 information sought by Plaintiff is relevant. However, upon reviewing the document
21 requests, the Court agrees with MTUDD that several of the requests are overbroad.
22 Therefore, the Court finds the scope of certain requests should be limited to documents
23 relating to other vessels with similar engine and/or fuel delivery system issues as the
24 subject vessel that arose while the other vessels were under warranty.

25 MTUDD also objects to several requests on grounds that the requests call for
26 proprietary trade secrets, and indicates that if the Court compels production, the Court
27 should enter a protective order. The Court declines to issue a protective order at this
28 time. However, the Court will entertain a joint motion for a protective order if the parties

1 determine such an order is necessary. The parties are directed to Judge Bartick's
 2 chambers rules² regarding protective orders for more information on the Court's
 3 requirements for all protective orders. In addition, MTUDD objects to some of the
 4 requests on the grounds of attorney-client privilege and attorney work product doctrine.
 5 To the extent MTUDD withholds any documents as privileged, it is advised that in
 6 accordance with Federal Rule of Civil Procedure 26(b)(5), parties withholding documents
 7 as privileged should identify and describe the documents in sufficient detail to enable the
 8 demanding party to assess the applicability of the privilege or protection. Therefore, for
 9 any document withheld as privileged, MTUDD shall provide Plaintiff with an appropriate
 10 privilege log.

11 Accordingly, Plaintiff's request to compel responses to its Requests for Production
 12 is GRANTED in part, and DENIED in part as follows:

- 13 a. The Court **GRANTS** Plaintiffs' Request for Production Nos. 25-26,
 14 29, 30, 32, 34, 36, 38, 40, 42, 46, 48, 50, 52, 54, 56, 58. However,
 15 the scope of production is limited to documents that pertain to other
 16 vessels with similar engine and/or fuel delivery system problems as
 17 the subject vessel that arose while the other vessels were under
 18 warranty.
- 19 b. The Court **GRANTS** Plaintiff's Request for Production No. 64.
- 20 c. The Court **GRANTS** Plaintiff's Request for Production Nos. 65-66.
 21 However, the scope of production is limited to documents that relate
 22 to the sale or servicing of MTUFN-related products and parts
 23 associated with the engines and/or the fuel delivery system that are
 24 similar to the engines and fuel delivery system in the subject vessel.
- 25 d. The Court **GRANTS** Plaintiff's Request for Production No. 67.
 26 However, the scope of production is limited to documents pertaining
 27 to distributor agreements relating to engines and/or the fuel delivery

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2Judge Bartick's chambers rules are available on the Court's website at: www.casd.uscourts.gov.

1 system that are similar to those in the subject vessel.

2 e. The Court **GRANTS** Plaintiff's Request for Production Nos. 69 and

3 71-73.

4 f. The Court **GRANTS** Plaintiff's Request for Production Nos. 74-77.

5 However, the scope of production is limited to documents that pertain

6 to other vessels and/or owners that had warranty claims, or reported

7 problems with the engines and/or fuel delivery systems within the

8 warranty period, that are similar to Plaintiff's claims.

9 g. The Court **GRANTS** Plaintiff's Request for Production Nos. 80, 81.

10 However, the scope of production is limited to documents that pertain

11 to warranty claims that are similar to Plaintiff's claims or the engine

12 and/or fuel delivery system problems experienced on the subject

13 vessel.

14 h. The Court **GRANTS** Plaintiff's Request for Production Nos. 84, 85.

15 However, the scope of production is limited to documents that pertain

16 to problems, errors, defects, or malfunctions that are similar to

17 Plaintiff's claims or the engine and/or fuel delivery system issues

18 experienced on the subject vessel.

19 i. The Court **GRANTS** Plaintiff's Request for Production Nos. 86-89.

20 j. The Court **GRANTS** Plaintiff's Request for Production Nos. 90, 91.

21 However, the scope of production is limited to documents that pertain

22 to problems, errors, defects, or malfunctions that are similar to

23 Plaintiff's claims or the engine and/or fuel delivery system issues

24 experienced on the subject vessel.

25 k. The Court **GRANTS** Plaintiff's Request for Production Nos. 94, 95.

26 However, the scope of production is limited to documents that pertain

27 to proposed or attempted repairs for any problems, errors, defects, or

28 malfunctions that are similar to Plaintiff's claims or the engine and/or

fuel delivery system problems experienced on the subject vessel, and that occurred while the other vessels were under warranty.

1. The Court **GRANTS** Plaintiff's Request for Production Nos. 96-99.
- m. The Court **GRANTS** Plaintiff's Request for Production Nos. 102-103. However, the scope of production is limited to documents pertaining to issues that are similar to Plaintiff's claims or the engine and/or fuel delivery system problems experienced on the subject vessel.
- n. The Court **DENIES** Plaintiff's Request for Production No. 104. The Court finds this Request is unduly burdensome and seeks information that is equally accessible to Plaintiff.

2. Sufficiency of Written Responses to Requests Numbers 39, 41, 63 and

70 Plaintiff argues MTUDD's responses to four of its Requests for Production are responsive and should be supplemented. First, with respect to Request for Production Nos. 39 and 41, Plaintiff requests that MTUDD conclusively state whether responsive documents exist. MTUDD indicates that it will amend its responses as requested by Plaintiff. Next, Plaintiff argues the response to Request No. 63 is inadequate because MTUDD does not indicate whether any documents exist regarding "purchase and/or sale" of the subject engines, as opposed to only the sale. MTUDD states that it neither sold nor purchased the engines at issue. Finally, Plaintiff contends the response to Request No. 70 is insufficient and states MTUDD must provide documents reflecting warranties for the fuel delivery system, not just the subject engines. MTUDD indicates that no separate warranties were issued for the fuel delivery system engine.

Having considered the parties position with respect these Requests for Production,
IT IS HEREBY ORDERED as follows:

a. Plaintiff's request to compel supplemental responses to Requests for Production Nos. 39 and 41 are denied as MOOT. MTUDD has agreed to

amend its responses to these Requests.

- b. Plaintiff's request to compel a supplemental response to Request for Production No. 63 is **GRANTED**. MTUDD shall supplement its response in accordance with its representation that it "neither sold nor purchased the engines at issue."
- c. Plaintiff's request to compel a supplemental response to Request for Production No. 70 is **GRANTED**. MTUDD shall supplement its response in accordance with its representation that "no warranties were issued for the fuel delivery system."

3. Proper Timeframe of Responsive Documents

11 Plaintiff next argues MTUDD improperly limits the time period of responsive
12 documents to those in existence prior to the filing of the lawsuit. Plaintiff contends the
13 time frame of responsive documents includes all documents in MTUDD's possession,
14 including documents obtained after the filing of the complaint. Plaintiff argues post-
15 filing documents may be relevant to show what MTUDD knew with respect to the
16 problems on the subject vessel and other vessels with similar problems, how MTUDD
17 proceeded with Plaintiff's warranty claims, and how MTUDD addressed the repair
18 attempts. MTUDD counters that the scope of production should be limited to only those
19 documents that were in existence prior to the commencement of this action. MTUDD
20 contends post-complaint documents are irrelevant to Plaintiff's claims. MTUDD further
21 argues post-claim documents regarding warranty work constitutes subsequent remedial
22 measures, which are not admissible in proving liability.

23 Federal Rule of Civil Procedure 26(b)(1) does not impose any limitation on
24 discovery of matters that occur after the date the complaint is filed. *See Fed. R. Civ. P.*
25 26(b)(1). Therefore, the fact that Plaintiff is seeking documents that came into existence
26 after this suit was filed is not determinative of whether those documents are discoverable.
27 Rather, the general relevance standard applicable to discovery controls. That is, the
28 information sought is discoverable if it is “relevant to any party’s claim or defense” or

1 “appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*
 2 Indeed, district courts within the Ninth Circuit have recognized this principle. *See United*
 3 *States v. City of Torrance*, 164 F.R.D. 492, (C.D. Cal. 1995) (rejecting defendant’s
 4 argument that documents created after the complaint was filed were irrelevant, and noting
 5 that “[d]ocuments which bear a date after the filing of a complaint may relate to event
 6 occurring prior to the filing of the complaint.”) (*citing Joseph D.B. King v. E.F. Hutton*
 7 & Co., 117 F.R.D. 2, 5 (D.D.C. 1987). *See also Paolo v. Amco Ins. Co.*, 2003 WL
 8 24027878 (N.D. Cal. Dec. 16, 2003) (“Contrary to [defendant’s] argument, the filing date
 9 of [Plaintiff’s] lawsuit does not control the relevance of the information sought.”)).

10 Here, the Court rejects MTUDD’s objection that documents created after the
 11 complaint was filed are irrelevant. As Plaintiff contends, post-complaint documents may
 12 reflect on events or statements that occurred prior to the lawsuit which may bear on
 13 Defendants’ liability. Further, Plaintiff’s negligence claims are based on Defendants’
 14 attempts to diagnose and repair the subject vessel, which occurred both before and after
 15 the initiation of the lawsuit.

16 The Court further rejects MTUDD’s argument that documents created after the
 17 filing of the complaint are not discoverable because they relate to subsequent remedial
 18 measures. Although Federal Rule of Evidence 407 bars the admissibility of subsequent
 19 remedial measures to prove negligent or culpable conduct, it does not control pretrial
 20 discovery. *Granberry v. Jet Blue Airways*, 228 F.R.D. 647, (N.D. Cal. 2005). (“Rule 407
 21 governs admissibility. It does not preclude discovery.”). Discovery may be had of
 22 materials that are reasonably calculated to lead to admissible evidence, even if the
 23 materials themselves are not admissible. *See also Bernat v. City of California City*, 2010
 24 WL 4008361 (E.D. Cal. Oct. 12, 2010) (rejecting discovery objection based on Rule 407,
 25 and stating “though the evidence discovered may not, ultimately, be admitted at trial, this
 26 is no basis for refusing to disclose it during discovery”).

27 Accordingly, IT IS HEREBY ORDERED that MTUDD shall supplement its
 28 responses to Requests for Production Nos. 23-24, 27-28, 31, 33, 35, 37, 39, 41, 43-45,

1 47, 49, 51, 53, 55, 57, 59-62, 82-83, 92-93, and 100-101 to include all responsive
 2 documents in its possession that predate *and postdate* the filing of this lawsuit.³

3 **B. MTUFN's Responses to Plaintiff's Requests for Production**

4 **1. Jurisdiction**

5 MTUFN has served objection-only responses to all of Plaintiff's Requests for
 6 Production.⁴ MTUFN first objects to the discovery on the grounds that it is not subject
 7 to the jurisdiction of this Court. On January 24, 2013, the Honorable M. James Lorenz
 8 denied MTUFN's Motion to Dismiss for lack of personal jurisdiction. (ECF No. 96 at
 9 4-9.) Accordingly, the Court finds MTUFN's objection on this ground is moot.

10 **2. Whether the Federal Rules of Civil Procedure or the Hague Convention
 11 Should Govern Discovery in This Case**

12 MTUFN's second objection to Plaintiff's Requests for Production is that German
 13 law does not permit the discovery sought and that any discovery must comply with the
 14 Hague Convention. Plaintiff counters that the Hague Convention does not provide the
 15 exclusive or mandatory procedures for obtaining discovery from a foreign party, and the
 16 discovery procedures under the Federal Rules of Civil Procedure are available and
 17 controlling.

18 The Hague Conference adopted the Convention on the Taking of Evidence Abroad
 19 in Civil or Commercial Matters (Hague Convention) in 1970. *Societe Nationale*
 20 *Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 524
 21 (1987) (hereinafter "Aerospatiale"). The Hague Convention "prescribes certain
 22 procedures by which a judicial authority in one contracting state may request evidence
 23 located in another contracting state." *Id.* Both The United States and Germany have
 24 acceded to this convention.

25
 26 ³As the Court stated previously, if MTUDD believes any responsive documents are protected
 27 by a privilege, it must provide Plaintiff with an appropriate privilege log. Further, any concerns
 regarding proprietary or trade secret information may be addressed through a joint motion for a
 protective order.

28 ⁴MTUFN states that notwithstanding its objections, it is in the process of reviewing documents
 that it intends to voluntarily produce that are related to the vessel and engines at issue.

1 However, in *Aerospatial*, the Supreme Court held the Hague Convention *does not*
 2 provide the “exclusive and mandatory procedures for obtaining documents and
 3 information located within the territory of a foreign signatory.” *Aerospatiale*, 482 U.S.
 4 at 529. The Court noted that while the procedures proscribed by the Hague Convention
 5 were not mandatory to satisfy international comity, “the Hague Convention does ‘apply’
 6 to the production of evidence in a litigant’s possession in the sense that it is one method
 7 of seeking evidence that a court may elect to employ.” *Id.* at 541. The Court further held
 8 that the concept of international comity requires a “particularized analysis of the
 9 respective interests of the foreign nation and the requesting nation,” and created a
 10 balancing test for lower courts to apply. *Id.* at 543. In determining whether to permit
 11 discovery under the Federal Rules of Civil Procedure, courts are to balance the following
 12 factors:

13 (1) the importance to the ... litigation of the documents or other information requested;
 14 (2) the degree of specificity of the request;
 15 (3) whether the information originated in the United States;
 16 (4) the availability of alternative means of securing the information; and
 17 (5) the extent to which noncompliance with the request would undermine
 18 important interests of the United States, or compliance with the request would
 19 undermine important interests of the state where the information is located.

20 *Aerospatiale*, 482 U.S. at 544, n.28.

21 The Supreme Court noted that this list of factors is not exhaustive. *Id.* In
 22 *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (1992), the Ninth Circuit
 23 considered two additional factors: “[1] the extent and the nature of the hardship that
 24 inconsistent enforcement would impose upon the person, and [2] the extent to which
 25 enforcement by action of either state can reasonably be expected to achieve compliance
 26 with the rule prescribed by that state.” *Richmark*, 959 F.2d at 1475.

27 The Court will consider each of these factors in order to determine if disclosure
 28 should be ordered under the Federal Rules of Civil Procedure or whether Plaintiff should

1 adhere to the procedures provided by the Hague Convention.

2 **a. The Importance of the Discovery Requested to the Litigation**

3 “Where the outcome of litigation does not stand or fall on the present discovery
 4 order, or where the evidence sought is cumulative of existing evidence, courts have
 5 generally been unwilling to override foreign secrecy laws. Where the evidence is directly
 6 relevant, however, we have found this factor to weigh in favor of disclosure.” *Richmark*,
 7 959 F.2d at 1475 (internal quotation marks and citations omitted). MTUFN readily
 8 admits that documents related to the engine at issue are important to this litigation.
 9 However, MTUFN contends that documents related to other engines not at issue are not
 10 important to the litigation.

11 As the Court has already found, documents pertaining to other vessels and engines
 12 with similar problems as the subject vessel are relevant to this case. In the Second
 13 Amended Complaint, Plaintiff has pled causes of action for breaches of implied and
 14 express warranties of merchantability and negligence against MTUFN. (ECF No. 98, ¶¶
 15 38-45, 53-67.) In order to prove that a plaintiff’s injuries were prominently caused by
 16 a breach of implied warranty of merchantability, courts have often permitted a showing
 17 that, under similar circumstances, similar products manufactured or sold by the defendant
 18 have had similar failures to the product at issue. *See* 26 Am. Jur. Proof of Facts 2d 1.
 19 Additionally, Plaintiff asserts that MTUFN knew that the other engines had similar
 20 issues, which is relevant to Plaintiff’s causes of action, including its negligence claim.
 21 Therefore, the information sought by Plaintiff in its Requests for Production is important
 22 for proving Plaintiff’s causes of action. As such, the importance of the documents to the
 23 litigation weighs in favor of compelling disclosure under the Federal Rules of Civil
 24 Procedure.

25 **b. The Specificity of the Discovery Request**

26 “A second consideration in evaluating a discovery request is how burdensome it
 27 will be to respond to that request.” *Richmark*, 959 F.2d at 1475. Here, while Plaintiff has
 28 propounded a large number of Requests for Production to MTUFN (81 requests in Set

1 No. One), each request is sufficiently specific in identifying documents sought relating
2 to the subject engine, specific components of the engine or fuel delivery system, similar
3 engines and communications between MTUFN and other defendants or third parties
4 involved in the manufacture, sale, and installation of the subject engine and similar
5 engines. Further, as ordered above, the Court has imposed limitations on the scope of
6 production for several of the Requests. Accordingly, this factor favors disclosure under
7 the Federal Rules of Civil Procedure.

c. Location of the Information and Parties

9 “The fact that all the information to be disclosed are located in a foreign country
10 weighs against disclosure, since those people and documents are subject to the law of that
11 country in the ordinary course of business.” *Richmark*, 959 F.2d at 1475. It seems likely
12 that nearly all of the documents requested of MTUFN are located within Germany.
13 Therefore, this factor favors non-disclosure under the Federal Rules, and favors
14 application of the procedures proscribed by the Hague Convention.

d. Alternative Means of Securing the Information

16 “If the information sought can easily be obtained elsewhere, there is little or no
17 reason to require a party to violate foreign law.... In this circuit, the alternative means
18 must be ‘substantially equivalent’ to the requested discovery.” *Richmark*, 959 F.2d at
19 1475. In several of Plaintiff’s Requests for Production, documentation is sought
20 regarding communications between MTUFN and third party corporations and other
21 parties to the case, such as Ferreti, Marinemax, VPS, Bosch, and even the Plaintiff,
22 Pershing. Since these other third persons/parties are United States corporations, these
23 communications presumably can be obtained through discovery requests to parties, or
24 subpoenas to the third persons. Therefore, as to communications with United States
25 parties and third persons, it appears this factor weighs in favor of non disclosure under
26 the Federal Rules. However, Plaintiff indicates that it has subpoenaed at least two of
27 these other third parties. Plaintiff reports these entities have not been cooperative in
28 producing documents. In addition, there are several other Requests that do not relate to

1 communications with other parties. These include requests for internal notes and
 2 documents reflecting defects in the subject engines and related engines. Documents
 3 responsive to these Requests are likely only in the possession of MTUFN. Since there
 4 are no clear alternative means of securing the information sought by these requests, this
 5 factor weighs in favor of disclosure under the Federal Rules of Civil Procedure.

6 **e. Balancing of National Interests**

7 “This is the most important factor. We must assess the interests of each nation in
 8 requiring or prohibiting disclosure, and determine whether disclosure would affect
 9 important substantive policies or interests of either the United States or [Germany].”
 10 *Richmark*, 959 F.2d at 1476 (internal quotation marks and citation omitted). In assessing
 11 the strength of Germany’s interests, the Court must consider “expressions of interest by
 12 the foreign state,” “the significance of disclosure in the regulation ... of the activity in
 13 question,” and “indications of the foreign state’s concern for confidentiality prior to the
 14 controversy.” *Richmark*, 959 F.2d at 1476, *citing* Restatement (Third) of Foreign
 15 Relations Law § 442, comment c.

16 MTUFN is incorrect in asserting that the United States does not have any important
 17 interests involved in this discovery dispute. The United States has a interest in
 18 “vindicating the rights of American plaintiffs.” *Richmark*, 959 F.2d at 1477. This
 19 interest has been described as “vital.” *Reinsurance Co. of Am., Inc. v. Administratia*
 20 *Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1280 (7th Cir. 1990).

21 MTUFN asserts that compelling the production of discovery in this case would
 22 force MTUFN to violate the German Federal Data Protection Act, known as the
 23 Bundesdatenschutzgesetz (“BDSG”). The BDSG is a “blocking statute” that penalizes
 24 the unauthorized collection, processing or use of personal information. “Blocking
 25 statutes” such as the BDSG do not deprive American courts of the power to order a party
 26 to produce evidence under the Federal Rules, although the production of the evidence
 27 may violate the statute and subject the defendant to penalties. *Aerospatiale*, 482 U.S. at
 28 543 n. 29. Such statutes are “relevant to the court’s particularized comity analysis only

1 to the extent that [their] terms and [their] enforcement identify the nature of the sovereign
 2 interests in nondisclosure of specific kinds of material.” *Id.* Therefore, even though civil
 3 penalties can be imposed on MTUFN for violating the BDSG, this Court is not deprived
 4 of the power to order MTUFN to respond to Plaintiff’s Request for Production.
 5 However, the BDSG does provide insight into Germany’s interests in nondisclosure of
 6 personal data. The BDSG’s explicit purpose is to “protect individuals against
 7 infringement of their right to privacy as the result of the handling of their personal data.”
 8 (ECF No. 95-7 at 6.)

9 Here, disclosure can be ordered while still achieving the policies of the BDSG.
 10 MTUFN can, and allegedly has begun to, obtain consent of its employees for disclosure
 11 of documents containing the personal information. In addition, with the exception of two
 12 Requests,⁵ it does not appear that personal information protected by the BDSG is sought
 13 by Plaintiff; Plaintiff is seeking documents relating to the subject engine and similar
 14 engines. Any personal information of German citizens contained in any documents for
 15 which Defendant cannot obtain can be redacted, subject to a subsequent in camera review
 16 if necessary. Alternatively, a protective order can be requested.

17 Given the avenues available to MTUFN to safeguard personal information
 18 protected by the BDSG, this factor weighs slightly in favor of the United States’ interest
 19 and disclosure under the Federal Rules.

20 **f. Hardship to MTUFN**

21 “The effect that a discovery order is likely to have on the foreign company is
 22 another factor to be considered.” *Richmark*, 595 F.2d at 1477. This factor is concerned
 23 primarily with any sanctions or criminal penalties a foreign defendant may suffer in its
 24 own country for complying with a discovery request in a United States court. *See id.* at
 25 1475, 1477. MTUFN contends that if it is ordered to produce documents in violation of

26
 27 ⁵The Court notes that Request for Production Nos. 54 and 55 do specifically request documents
 28 revealing the identities of owners of vessels that use the same engines and fuel delivery systems as the
 subject vessel. It is unknown if any of these owners are also German citizens. To the extent they are,
 the Court finds MTUFN can either obtain consent to disclose their personal information, redact their
 personal information, or request a protective order.

1 the BDSG, it will be liable for “civil penalties ranging from €25,000 to €50,000 per
 2 occurrence, or from €250,000 to €3000,000 for serious violations.” (ECF No. 95 at 18.)
 3 However, as MTUFN concedes, it is in the process of obtaining consent from its
 4 employees for disclosure of documents containing their personal information. Therefore,
 5 it is not certain that MTUFN will in fact face any civil penalties. Given the potential for
 6 civil penalties, this factor weighs in favor of non-disclosure.

7 **g. Likelihood of Compliance**

8 “If a discovery order is likely to be unenforceable, and therefore to have no
 9 practical effect, that factor counsels against requiring compliance” *Richmark*, 959 F.2d
 10 at 1478. Even if it were impossible to force a foreign entity to comply with a discovery
 11 order, this would not necessarily preclude ordering discovery under the Federal Rules.
 12 *Id.* “[A] clear statement that foreign corporations which avail themselves of business
 13 opportunities in the United States must abide by United States laws might have a
 14 substantial effect on the way [such] corporations do business in the United States in the
 15 future.” *Id.*

16 The Court has already established jurisdiction over MTUFN by determining that
 17 MTUFN has purposefully availed itself to the laws of California. (See ECF No. 96.)
 18 Additionally, MTUFN has already begun efforts to review documents (relating to the
 19 vessel and engines at issue) and obtain consent of employees whose personal information
 20 appears on these documents for production in response to Plaintiff’s Requests.
 21 MTUFN’s effort to be responsive to at least some of Plaintiff’s requests suggests that
 22 MTUFN would comply with an order compelling MTUFN to respond and produce
 23 documentation. Accordingly, this factor weighs in favor of compelling discovery under
 24 the Federal Rules.

25 **h. Conclusion**

26 Taking all of the above *Aerospatiale* and *Richmark* factors into consideration, the
 27 Court concludes that discovery under the Federal Rules of Civil Procedure should govern.
 28 The documentation requested by Plaintiff from MTUFN is identified with sufficient

1 specificity, is highly relevant and important to the litigation, does not appear to be readily
2 available elsewhere, and can be disclosed in such a manner that satisfies the policies of
3 both United States and German Law. Accordingly, IT IS HEREBY ORDERED that:

4 a. Plaintiff's request to compel MTUFN to provide supplemental responses its
5 Request for Production is **GRANTED**.

6 b. The Court's order with respect to MTUDD, as addressed above, shall apply
7 equally to MTUFN.

8 **III.CONCLUSION**

9 For the foregoing reasons, the Court HEREBY ORDERS MTUDD and MTUFN
10 to provide supplemental responses to Plaintiff's Requests for Production, in accordance
11 with the terms of this order, within 30 days of the date of this order.

12 **IT IS SO ORDERED.**

13 DATED: March 11, 2013

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15 DAVID H. BARTICK
United States Magistrate Judge

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